

10 Official Opinions of the Compliance Board 22 (2016)

- ◆ **1(C)(1) ADMINISTRATIVE FUNCTION EXCLUSION, GENERALLY - NOT APPLICABLE TO EVERY PERSONNEL MATTER**
- ◆ **1(C)(2) ADMINISTRATIVE FUNCTION, WITHIN EXCLUSION - ELECTIONS BOARD'S CONDUCT OF ELECTION AND ADMINISTRATION OF EXISTING REGULATIONS**
- ◆ **1(C)(3) ADMINISTRATIVE FUNCTION, OUTSIDE OF EXCLUSION - ELECTIONS BOARD'S FORMULATION OF PROCEDURES AND RECOMMENDATIONS TO CITY COUNCIL**
- ◆ **2(A) NOTICE – USE OF WEBSITE, GENERALLY**
- ◆ **2(D) NOTICE – METHODS FOR LAST-MINUTE MEETINGS, GENERALLY**
- ◆ **6(B)(1) MINUTES, GENERALLY - FOR JOINTLY HELD MEETING, ADOPTION OF VIDEO MINUTES KEPT BY OTHER PUBLIC BODY**
- ◆ **6(B)(3) MINUTES - FAILURE TO APPROVE WITHOUT UNDUE DELAY, VIOLATION**

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

May 2, 2016

Re: Mayor and City Council of Rockville and
Board of Supervisors of Elections
Max A. Balgooy, *Complainant*

Complainant Max A. van Balgooy alleges that the Mayor and City Council of Rockville (“Council”) violated the Open Meetings Act by failing to prepare minutes for four meetings in 2015 and, as to one of those meetings, by failing to provide a summary of a closed session in the minutes of the next open session. Complainant also alleges that the Board of Supervisors of Elections (“Elections Board”) failed to provide reasonable advance notice of, and minutes for, nineteen meetings in 2015. The City Attorney has responded on behalf of both public bodies.

The submissions raise the following questions:

1. Did the Council and the Elections Board comply with the Act's requirement that a public body prepare written minutes "as soon as practicable after [it] meets," unless live and archived video or audio streaming of the session is available?
2. After meeting in a closed session, did the Council make the disclosures required by the Act?
3. Did the Elections Board comply with the Act's requirement that it give "reasonable advance notice" of meetings subject to the Act?

Background

We begin with the facts relevant to the allegations that these two public bodies violated the Act's requirements on the keeping of minutes. The response does not contest the allegation that, as of the date of the complaint, the Council and Elections Board had not adopted minutes for the meetings in question. Instead, the response explains that the City Clerk's office, which staffs both public bodies, has been "extremely short-staffed" since August 2014, when the City Clerk resigned. Since May 2015, the duties for both public bodies have been performed by one employee and a temporary employee, and, in 2015, those duties included running the City's election with new voting equipment and on a schedule that included early voting for the first time. The response also states that the hiring process is underway for an additional employee in the town clerk's office.

The Council states that it has now adopted written minutes for the four meetings in question. The Council's website shows that it keeps minutes for its regular meetings in the form of live and archived streaming video, as is permitted by the Act as a substitute for written minutes. *See* § 3-306(b)(2).¹ However, none of these meetings was a regular meeting. Two were walking tours of Rockville neighborhoods and thus not held in Council chambers; those occurred in April and June 2015. The third was a meeting hosted by the Montgomery Council and streamed live by that public body; that occurred in December 2015. The Rockville Council's notice for that event stated: "The public is welcome to attend the meeting to listen to the discussion, tune in to cable channel Rockville 11, or stream it live on County Cable Montgomery from 7-9:30 p.m." The fourth meeting, held on the evening of January 25, 2015, was a closed meeting convened to discuss "the employment, compensation, and performance evaluation of the City

¹ Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified.

manager.” There are no separate written minutes for that meeting. The written minutes that the Council has now adopted for its January 26, 2015 meeting, a regular meeting, disclose information about the closed session. The video “minutes” of the January 26 meeting disclose merely that the Council met in closed session on the 25th.

The Elections Board only keeps written minutes. According to the response, the Elections Board has now adopted minutes for the meetings that it held from March 12, 2015 through November 4, 2015 and is “working to catch up on the remaining minutes.” The response states that a member of the elections board will create draft minutes so that minutes can be prepared and adopted more quickly.

We will include additional facts in the discussion.

Discussion

1. Whether the Council and the Elections Board complied with the Act’s requirements for the preparation of minutes for open sessions

When a public body’s meeting is subject to the Act, the public body must prepare written minutes “as soon as practicable after [it] meets,” unless “live and archived video or audio streaming of the open session is available.” § 3-306(b). The Act does not define “as soon as practicable.” We have said that the standard “recognizes the fact that [written] minutes cannot be made available instantaneously” and that the Act instead “permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes.” 2 *OMCB Opinions* 87, 88 (1999) (No. 99-18). The Act thus “allows practical circumstances to be considered and does not impose a rigid time limit.” *Id.* Nonetheless, excessive delays in preparing minutes interfere with the public’s right to inspect them. *See* § 3-306(d) (providing for public access to minutes).

As examples of a circumstances that might provide an “acceptable reason” for a delay in adopting minutes, we have cited “a temporary staffing shortage” or “special circumstances” such as an employee’s illness. *Id.* at 89. However, those circumstances should be temporary. We have found “routine delays of several months or longer” to be unacceptable, and we have stated that public bodies may not justify such delays “by pointing to limited staff time or competing priorities.” *Id.* In short, public bodies must generally “allocate the staff time needed to comply with the Act.” *Id.*

A. The timeliness of the Council's minutes

At issue is the Council's preparation of minutes for its three open sessions: the two walking tours, and the joint meeting with the Montgomery County Council. With respect to the walking tours, the threshold question is whether those events were "meetings" subject to the Act; if they were not, no violation occurred. Under the Act a "meeting" occurs when a public body has "convene[d] a quorum . . . to consider or transact public business." §3-101 (g); *see also, e.g., 9 OMCB Opinions 239* (2015)(addressing whether site tour by public body's members was a "meeting" while they were separated into small groups). Here, it seems likely that a quorum of the council members considered public business during at least portions of the walking tours. The minutes for both tours state that the council members heard remarks from the neighborhood association president and that "residents provided the Mayor, Councilmembers and City Staff with concerns, feedback and input on neighborhood topics." So, we will assume that the Act applied and that the Council was required to adopt minutes as soon as "practicable." § 3-306(b).

As for what was "practicable" for the Council, it is unclear from the response whether staffing shortages caused the delay in preparing minutes for the walking tours. Even so, the staffing shortage described in the response lasted too long to be viewed as a temporary circumstance that would justify these delays of over eight months. We therefore find that the Council violated the Act by not adopting minutes in a timely fashion.

We do not find a violation with regard to the provision of minutes for the Council's joint meeting with the Montgomery County Council. A public body "need not prepare written minutes" if "live and archived video or audio streaming of the open session is available." § 3-306(b). Here, the County Council had streamed the meeting live and archived it, and the Council's meeting notice had alerted the public to that fact and provided information on how to watch the video. Very likely, had Complainant gone to the City Clerk's office and asked to inspect a copy of the meeting minutes, he would have been directed to the archived video. We find that live and archived video streaming of the open session was (and is) available.

As for the Council's adoption, in March 2016, of written minutes that incorporated the County Council's video, it is a good practice for public bodies that rely on another public body's streaming audio or video to formally adopt it. It is also a good practice to promptly tell the public where to find that recording. Here, ideally, the Council would have promptly posted on its meeting website the fact that the meeting could be viewed on the County Council's website. However, the Act does not yet require public bodies to post any information about meeting minutes or videos—currently, § 3-306(d) only requires public bodies to make their minutes available for

inspection “during ordinary business hours”—and so we do not find a violation in that regard.²

B. The timeliness of the Elections Board’s minutes

As discussed above, a long-term staffing shortage does not excuse a public body from compliance with the Act; simply put, the Act does not make compliance contingent on adequate funding or hiring difficulties, and the “as soon as practicable” standard for the preparation of minutes cannot be stretched to permit routine delays of over several months. We find that the Elections Board violated the timeliness requirement in § 3-306(b) for some of the meetings in question.

We are not prepared to find that the Elections Board violated that provision for all of the meetings listed in the complaint, because it is not clear that every meeting was subject to the Act. When a public body meets solely to perform an administrative function, the meeting is exempt from the Act under § 3-103(a). Very generally speaking, a public body performs an administrative function when it is merely applying pre-set regulations to particular circumstances, and it is not performing an administrative function when it is discussing the adoption of a new policy, whether its own or for recommendation to another body. § 3-101(b); *see also, e.g.,* 10 *OMCB Opinions* 12, 15-16 (2016) (explaining the administrative function exclusion).³ Here, the meeting minutes that we have reviewed raise a strong possibility that some meetings, particularly those during and immediately surrounding the 2015 election, were administrative in nature. The City of Rockville’s website states: “The board is charged with the conduct of all City elections, the registration of voters and the keeping of records in connection with these functions.” The City Charter and Code extensively regulate the City elections. Accordingly, when the Elections Board met only to apply existing policies and procedures to specific circumstances, as when it was addressing complaints, certifying candidacies, or reviewing particular campaign finance reports, it was likely performing an administrative function as defined by § 3-101(b). When the Elections Board was formulating its own procedures, as appears to have been the case with one discussion at the March 26, 2015 meeting, it was not performing an administrative function, and it was required to hold the meeting in the open and issue minutes as soon

² The General Assembly has recently passed, and the Governor has signed, Senate Bill 17, which will require public bodies, “[t]o the extent practicable,” to post their recordings or written minutes online. The legislation will take effect on October 1, 2016. 2016 Laws of Md. Ch. 255.

³ For further explanation of the Act’s exclusions for administrative function and other functions, see pp. 16-19 of the Open Meetings Act Manual (Office of the Attorney General, November 2015), posted at <https://www.oag.state.md.us/Opengov/Openmeetings/index.htm>.

as practicable after the meeting. The Elections Board also does not perform an administrative function when, as authorized by the City Code, it considers making recommendations to the Council for the Council's consideration. According to the Elections Board's minutes, it performed that non-administrative function at some of the meetings in question.

The response states that the Elections Board is still working to prepare and adopt minutes for the meetings it held after November 4, 2015. We are unable to assess whether those meetings were subject to the Act.

2. Whether the Council made the requisite disclosures after its closed session on January 25, 2015

After a public body has met in a closed session subject to the Act, it must include a summary of the session in the minutes of its next public meeting. *See* § 3-306(c)(2). The summary must include: (1) the time, place, and purpose of the closed session; (2) each member's vote on the motion to close the session; (3) the statutory exception claimed as a basis for excluding the public; and (4) a list of the topics discussed, persons present, and actions taken in the closed session. *Id.*

Thus, if the January 25 closed-session discussion was subject to the Act, the Council was required to disclose that information in the minutes of its open meeting on January 26. The Council kept those minutes in the form of live and archived video, and the video discloses only that the Council met "in executive session" on January 25. That disclosure does not provide the requisite information. The Council recently adopted written minutes that do disclose the requisite information, but those are not the minutes of the next open session. So, if the Act applied, the Council violated it.

From the submissions, however, it is hard to determine whether the Act did apply to the January 25 discussion. The Council's written disclosures show that the Council "met with the City Manager to discuss the employment, assignment, compensation, and performance evaluation." We have long advised that a public body performs an administrative function when it has, and exercises, supervisory powers over an employee, and we have often commented on the confusion caused by the fact that there is an exception under § 3-305 for personnel matters regarding an individual. We recently catalogued our prior opinions, and reiterated our comments, in 9 *OMCB Opinions* 290, 292-95 (2015), and we refer the Council and the Complainant to that opinion. Here, only the "compensation" part of the discussion suggests a topic that was not administrative. Specifically, if the Council's discussion of the City Manager's compensation implicated an amendment to the current budget or an item for the upcoming budget, as opposed to the mere administration of an already-budgeted item, the discussion would likely have been quasi-legislative in nature and thus subject

to the Act. *See* § 3-101(j) (defining the “quasi-legislative function” to include the “process” of amending or approving a budget).

In sum, we are unable to determine whether the Council violated the Act in this regard because we cannot determine whether the Act applied. Generally, the safest course is to treat all meetings, administrative or not, as subject to the Act. It appears that the Elections Board has done that, although belatedly, by publishing a summary of the session.

3. Whether the Elections Board gave “reasonable advance notice” for 19 meetings held in 2015

The Act requires public bodies to give “reasonable advance notice” of their meetings. § 3-302 (a). Meeting notices must “include the date, time, and place of the session,” and the public body may publish them on the website “ordinarily used by the public body to provide information to the public,” so long as the public body “has previously given public notice that this method will be used.” § 3-302 (b), (c)(3). As for timeliness, we have long stated that “the touchstone of ‘reasonableness’ is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting.” 5 *OMCB Opinions* 83, 84 (2006). When a meeting must be called on an urgent basis, the public body may need to take extra measures to provide the best notice feasible under the circumstances. *See* Open Meetings Act Manual (November 2015) Chapter 2 (summarizing our opinions on the Acts’ notice requirements).

Again, not all of the Elections Board’s meetings were subject to the Act, but some, such as the March 26, 2015 meeting, were subject to the Act, and we will address the Elections Board’s notice practices through that example.

The Elections Board posts meeting information in several places on the City of Rockville’s website. Most prominently, the “Boards and Commissions” link under the “City Government” tab leads to a page for the Board of Elections. The following appears under a heading for “Meetings”:

- Meetings are held on an as needed basis
- Diamondback Terrapin Conference Room
Rockville City Hall, 3rd floor
111 Maryland Avenue
Rockville, MD 20850

During an election year (every four years), meeting[s] are held more frequently to perform special tasks such as confirmation on candidacy of those individuals running for office.

That text does not provide meeting dates and times or even a prediction as to frequency, and it also does not tell the public where to find that information. For example, there is no link to “Meeting Notices.” A heading for “Agendas and Minutes,” comes next, with a link to the agendas and this information: “Agendas and agenda materials are generally available the week of each scheduled meeting.” The agendas, though not described as “notices,” do provide the time, date, and place of the particular meeting, and some agendas also alert the public to future meetings. However, a notice made “generally available the week of each scheduled meeting” is not necessarily timely under § 3-302(a). For example, the minutes of the February 25, 2015 meeting show that the Elections Board expected to meet on March 26. Assuming that the Elections Board posted the agenda “the week of” March 26, it did not post notice as soon as practicable after it had scheduled the meeting, and it therefore violated the Act.

Theoretically, a person who followed the Elections Board’s work closely could read the meeting minutes, when posted promptly, and then check the website during the week of any meeting projected to occur. However, as established above, the Elections Board’s minutes were not posted promptly in 2015, so the public did not have any direction on when a meeting might occur until an agenda was posted. More to the point, the “reasonable advance notice” required by § 3-302(a) is to be given in a meeting notice that contains all of the required information and is not properly given in the minutes of past meetings.

The Elections Board’s meetings are also posted on the City’s “Calendar,” which is searchable by entity, but only two of the meetings in question were posted there. The March 26 meeting, for example, was not posted there. The calendar notices list the date, time, and place of the meetings. That method would have been effective if the Election Board’s website had directed the public to it and if it had been used consistently.

With regard to the meetings subject to the Act, we conclude that the Elections Board did not provide the public with reasonable advance notice for at least one of the meetings in question. We encourage the Elections Board to include in its “Meetings” information clear instructions on where the public can find meetings notices that contain all of the required information. With regard to the meetings held on an urgent basis, we are unable to determine whether they were solely administrative in nature. It might be helpful for the Elections Board to devise supplementary methods of giving notice, such as emailing the notice to members of the press who cover the City’s activities, when the Elections Board must call a meeting on short notice. And, when meeting details are tentative, the public is well-served by an early posting of the date, along with instructions on when to

check back for the complete notice. On that, we refer the Elections Board to the advice we gave in 9 *OMCB Opinions* 206, 209 (2015).

Conclusion

We have concluded that the Council and the Elections Board did not timely adopt meeting minutes for meetings in 2015, and we have noted that the City will be adding staff to enable these public bodies to do that more quickly. We have also concluded that the Elections Board's practice of providing notice through its agendas did not always convey the required information reasonably in advance of each meeting. We were unable to resolve some allegations because we were unable to determine whether some of the meetings in question were subject to the Act, but we have provided advice on the applicable principles for these public bodies' future reference.

Open Meetings Compliance Board

Jonathan A. Hodgson, Esq.

April C. Ishak, Esq.

Rachel A. Shapiro Grasmick, Esq.